IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20-7-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Writ Petition No.13235, 13236, 13237, 13265, 13266, 13267, 13970, 13971, 13972, 13973, 13974 of 2006

S.M.Sudalai Andi	..	Petitioner in WP.No.13235 of 2006
I.Rangaswamy	..	Petitioner in WP.No.13236 of 2006
S.Samy	..	Petitioner in WP.No.13237 of 2006
V.K.Elumalai	..	Petitioner in WP.No.13265 of 2006
D.Varadarajulu	..	Petitioner in WP.No.13266 of 2006
S.Elumalai	..	Petitioner in WP.No.13267 of 2006
P.Rajamanickam	..	Petitioner in WP.No.13970 of 2006
S.Mohammed Sulaiman	..	Petitioner in WP.No.13971 of 2006
D.Sivanandam	..	Petitioner in WP.No.13972 of 2006
R.Vairam	..	Petitioner in WP.No.13973 of 2006
P.Perumal	..	Petitioner in WP.No.13974 of 2006

Vs.

1. Government of India,
   rep.by its Secretary,
   Ministry of Labour,
   Sharanshakthi Bhavan,
   Rafi Marg,
   New Delhi - 1.

2. Food Corporation of India,
   rep.by its Senior Regional Manager,
   5/54, Greams Road,
   Chennai - 600 006. ... Respondents in all the petitions

The above writ petitions have been filed under Article 226 of Constitution of India, praying this Court to issue a writ of mandamus directing the first respondent to refer the following disputes "Whether the action of the Food Corporation of India, Chennai in denying employment to S.M.Sudalai Andi, I.Rangaswamy, S.Samy,V.K.Elumalai, D.Varadarajulu, S.Elumalai, P.Rajamanickam, S.Mohammed Sulaiman, D.Sivanandam, R.Vairam and P.Perumal with effect from 31.5.2001 on completion of 58 years of age without issuing a notice under section 9A of the I.D. Act 1947 is justified. If so what relief he is entitled to?of the respective petitioners to the Industrial Tribunal, Second Floor, City Civil Court Building, High Court Compound, Chennai-600 104, by issuing notification as the Central Government Industrial Tribunal for deciding the disputes with a direction to dispose of the Industrial Disputes so referred within a period of six months.

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For Petitioners : Mr.S.Vaidyanathan
For 1st Respondent : Mr.S.Udayakumar,SCGSC
For 2nd Respondent : Mr.A.S.Thambusamy

O R D E R

The common prayer in the above writ petitions is to issue a writ of mandamus directing the first respondent to refer the disputes raised by the respective petitioners to the Industrial Tribunal (Central Government) by issuing notification for deciding and dispose of the disputes within a period of six months.

2. The petitioners claim that their age of retirement under the second respondent is 60 years and the second respondent superanuated the petitioners at the age of 58 years. The said reduction of age by the second respondent from 60 years to 58 years was made without issuing any notice under section 9A of the Industrial Disputes Act to alter the service conditions. According to the petitioner, the Conciliation Officer viz. the Assistant Labour Commissioner (Central), submitted failure report on 26.5.2005 with regard to the disputes raised by the petitioners and the first respondent has not referred the matter to the Labour Court and therefore these writ petitions are filed.

3. The second respondent filed counter affidavit and stated that the age of superannuation for departmental labourers of Food Corporation of India remains 58 years even though the Labourers were allowed to work upto 60 years and the reduction of age of superannuation from 60 years to 58 years is not an alteration of conditions of service and therefore section 9A of the Industrial Disputes Act has no application to the facts of these cases.

4. The first respondent has not filed any counter affidavit. However, the learned counsel appearing for the first respondent submitted that the first respondent will consider the request of the petitioners either to refer the matter or otherwise if a direction is issued.

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5. The learned counsel appearing for the petitioners cited the following decisions in support of his contentions.

(a) 1987 (1) LLJ 209
(V.Veerarajan and others v. Government of Tamil Nadu and Others)

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(b) 1991 Supp (2) SCC 10
(Dhanbad colliery Karamchari Sangh v. Union of India)

(c) (1989) 3 SCC 271
(Telco Convoy Drivers Mazdoor Sangh v. State of Bihar)

(d) W.P.No.397 of 2006 (Sivanandha Steel Employees' Union, Chennai

v. Labour Officer (Conciliation), Chennai and Others) dated 28.4.2006

(e) (2005) 13 SCC 42
(Air India Ltd. and others v. Vishal Capoor and others)
(f) 2006 (2) LLN 604
(Philips India Ltd., v. P.N. Thorat, Assistant Commissioner of
Labour and Conciliation Officer and others)

6. The learned counsel for the first respondent relied on the following decisions.

(i) 1985 (1) LLJ 519
(M.P.Irrigation Karamchari Sangh v. State of M.P. and another)

(ii) 1987 (1) LLJ 177
(Shaw Wallace & Co. Ltd. v. State of Tamil Nadu represented by the
Commissioner and Secretary, Labour Department and others)

7. Let us first consider the decisions relied on by the learned counsel appearing for the petitioners.

(a) In the first decision reported in 1987 (1) LLJ 209 (V.Veerarajan and others v. Government of Tamil Nadu and Others) the Honourable Supreme Court held that if the dispute in question raises a question of law the appropriate Government should not purport to reach a final conclusion on the said question of law because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed question of fact, the appropriate Government cannot purport to reach final conclusions for that again would be the province of the Industrial Tribunal.

(b) In 1991 Supp (2) SCC 10 (Dhanbad Colliery Karamchari Sangh v. Union of India) in paragraph 3, the Supreme Court held as under,

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"3. After hearing learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the opinion that this appeal must succeed. The Central Government instead of referring the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947, it itself decided the dispute which is not permissible under the law. We, accordingly, allow the appeal, set aside the order of the High Court and of the Central Government and direct the Central Government to refer the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947. We further direct the Central Government to make the reference within three months."

(c) In (1989) 3 SCC 271 (Telco Convoy Drivers Mazdoor Sangh v. State of Bihar), in paragraphs 13 to 15 the Honourable Supreme Court held thus,

"13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See Ram avtar Sharma v. State of Haryana ((1985) 3 SCC 189); M.P.Irrigation Karamchari Sangh v. State of M.P. ((1985) 2 SCC 103); Shambhu Nath Goyal v. Bank of Baroda, Jullundur ((1978) 2 SCC 353).

14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the government in exercise of its administrative

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function under Section 10(1) of the Act. As has been held in M.P.Irrigation Karamchari Sangh case ((1985) 2 SCC 103), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the government should be very slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

15. We are, therefore, of the view that the State Government, which is the appropriate government, was not justified in adjudicating the dispute, namely, whether the convoy drivers are workmen or employees of TELCO or not and, accordingly, the impugned orders of the Deputy Labour Commissioner acting on behalf of the government and that of the government itself cannot be sustained."

(d) In the recent decision of a Division Bench of this Court in W.P.No.397 of 2006 (Sivanandha Steel Employees' Union, Chennai v. Labour Officer (Conciliation), Chennai and Others) dated 28.4.2006, this Court directed to refer the dispute, if no conciliation is arrived at within a period of four weeks.

(e) In (2005) 13 SCC 42 (Air India Ltd and others v. Vishal Capoor and others), in paragraph 49, the Honourable Supreme Court gave positive direction to refer the dispute, which is extracted hereunder,

"49. We, therefore, set aside the decision of the High Court and allow the appeals. It is directed that the appropriate Government shall refer the following questions for adjudication by the appropriate Tribunal:

1. Whether the 1998 settlement or any portion thereof is liable to be set aside on the grounds of fraud, undue influence, etc. as alleged by the Adhikari group ?

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2. Whether the requirement of the ALTP licence was necessary for co-pilots ?

3. Whether the Adhikari group was entitled to seniority over the CPL-holders in the line seniority list ?

4. What is the legal effect of the Conciliation Officer's recommendation of the Adhikari group's case and Air India's acceptance thereof ?

5. To what relief are the parties entitled ?"

(f) A reference made to the Labour Court was challenged before the Bombay High Court by the employer on the ground that industrial dispute does not exist. A Division Bench of Bombay High Court in the decision reported in 2006 (2) LLN 604 (Philips India Ltd., and another v. P.N.Thorat, Assistant Commissioner of Labour and Conciliation Officer and others) held that whether there are triable issue or not has to be decided only by the Industrial tribunal and not by the High Court under Article 226 of Constitution of India. Paragraph 12 of the said decision can be usefully referred which reads as under,

"12. From the above, what emerges is that there are serious triable issues. The contention of the union and the workmen is that fraud has been practised upon them. If the workmen are able to succeed in proving that the agreement was entered into by playing fraud it will be open to them to avoid the settlement. This issue cannot be answered by this Court at this stage as it would require evidence to be led. Prima facie a Division Bench of this Court in the very proceedings has taken note that the employees involved in both the writ petitions would be workmen. The Apex Court, however, left that question to be decided. At any rate the expression workmen considering S.2(s) of the Industrial Disputes Act would include ex-workmen. That contention of the management that they are not workmen would require adjudication of facts. Based on these findings and the issue of pensionary benefits under VRS it will have to be considered whether the dispute partakes of an industrial dispute. This, again would be

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premature for this Court to decide at this stage and it will be open to the petitioners to raise all it issues before the Industrial Tribunal to which the reference is made. Similarly, the contention of the employer that they have complied with the terms of the settlement and consequently there is no industrial dispute and that the employees cease to be workmen will have to be adjudicated upon by the Tribunal."

8. Now, let us consider the decisions relied on by the learned counsel for the first respondent.

(i) In 1985 (1) LLJ 519 (M.P.Irrigation Karamchari Sangh v. State of M.P. and another) the Honourable Supreme Court held that the question relating to the conditions of service of employees was a matter primarily to be decided by the Tribunal and the same cannot be adjudicated by the Government and the Government should be slow to examine the merits of the demand to decline reference. In paragraph 7 of the Judgment it is held thus,

"7. There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S.12(5) of the Industrial Disputes Act nugatory."

(ii) In the decision of a Division Bench of this Court reported in 1987 (1) LLJ 177 (Shaw Wallace & Co. Ltd. v. State of Tamil Nadu represented by the Commissioner and Secretary, Labour Department and others), in paragraph 32, the principles are summarised and it is held that making reference is a rule and refusal to refer is an exception. Paragraph 32 reads as under,

"32. On a final analysis, the following principles emerge:-

(1) The government would normally refer the dispute for adjudication;

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(2) The Government may refuse to make reference, if-

(a) the claim is very stale;

(b) the claim is opposed to the provisions of the Act;

(c) the claim is inconsistent with any agreement between the parties;

(d) the claim is patently frivolous;

(e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;

(f) the person concerned is not a workman as defined by the Act;

(3) The Government should not act on irrelevant and extraneous considerations;

(4) the Government should act honestly and bona fide;

(5) The Government should not embark on adjudication of the dispute; and

(6) The Government should not refuse reference on the ground that domestic enquiry was fairly and properly held and punishment awarded was appropriate."

9. As rightly submitted by the learned counsel for the petitioner, the failure report has been submitted by the Assistant Labour Commissioner (Central), Chennai, as early as on 26.5.2005 and till date the first respondent has not taken any decision. Therefore, there is no purpose in giving direction to the first respondent to decide the matter on merits at this stage.

10. From the analysis of the above referred decisions of the Honourable Supreme Court as well as Division Bench of this Court and having regard to the failure report submitted by the Regional Labour Commissioner (Central), Chennai-6, I am of the view that the first respondent is bound to refer the disputes raised by the respective petitioners, as the disputes cannot be adjudicated by

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the first respondent on merits. Whether the petitioners are entitled to adjudication of disputes in their favour or not is to be decided only by the Industrial Tribunal and not by the first respondent.

11. In view of the above findings, all the writ petitions are allowed with a direction to the first respondent to refer the disputes raised by the respective petitioners before the Industrial Tribunal (Central Government), Second Floor, City Civil Court Buildings, High Court Compound, Chennai-600 104, within a period of six weeks from the date of receipt of copy of this order and on such reference, the Tribunal shall dispose of the disputes at the earliest. No costs.

vr

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1.The Secretary, Ministry of Labour, Government of India, Sharanshakthi Bhavan, Rafi Marg, New Delhi - 1.

2.The Senior Regional Manager, Food Corporation of India, 5/54, Greams Road, Chennai - 600 006.

3.The Presiding Officer, Industrial Tribunal, (Central Govt.,) II Floor, City Civil Court Buildings, High Court Compound, Chennai-104.

+ one cc to Mr.S.Udayakumar, Senior Central Govt., Standing Counsel, Sr.No.32021.

+ 11 Ccs to Mr.A.S.Thambuswamy,Advocate Sr.Nos.31916 to 31926.

+ 11 Ccs to Mr.S.Vaidyanathan, Advocate Sr.Nos.32132 to 32142.

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